

DATE: January 30, 1995

CASE NO.: 94-SWD-1

IN THE MATTER OF

Johnny E. Miller,  
Complainant,

v.

ThermalKEM, Inc.,  
Respondent.

Appearances:

Robert Guild, Esq.  
Richard Condit, Esq.                      For the Complainant  
Mick Harrison, Esq.

Langley R. Shook, Esq.  
Tamara Parker, Esq.                      For the Respondent  
Kathryn B. Thomson, Esq.

Before:              Richard K. Malamphy  
                         Administrative Law Judge

### **RECOMMENDED DECISION AND ORDER**

This matter arises under the Solid Waste Disposal Act, (SWDA), Public Law 94-580, Section 1001, 42 USC 6901 and 6971, and the implementing regulations found at 29 CFR Part 24. A formal hearing was conducted on May 31 through June 3, 1994, and from June 13-17, 1994, in York, South Carolina.

The Solid Waste Disposal Act provides in 42 USC § 6971(a) that,

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

In order to establish a prima facie case of discrimination under 42 USC §6971(a), the complainant must show by a preponderance of the evidence that the respondent is an employer and that the complainant is an employee subject to the Act; that the complainant was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; that the complainant engaged in "protected activity"; that the respondent had knowledge of the complainant's protected activity; and that the complainant's protected activities provided at least partial motivation for the respondent's personnel actions against the complainant. See Mackowiak v. University Nuclear Systems, Inc., 735 F. 2d 1159, (9th Cir. 1984); Dartey v. Zack Co., 82-ERA-2, slip op. of Secretary of Labor (April 25, 1983).

### **BACKGROUND**

ThermalKEM is a hazardous waste storage and treatment facility engaged in the incineration of both solid and liquid hazardous wastes, and such wastes are received at the site in 55 gallon or larger drums, either in liquid or solid forms. The solid wastes are repackaged in fiber drums which are then fed into the feed hopper of the hazardous waste incinerator. Liquid wastes are pumped either directly to the incinerator, or from a series of tanks known as blend tanks where liquid hazardous wastes are stored in larger quantities after receipt in smaller drums for later feeding into the incinerator. The ThermalKEM incinerator is located within the city limits of Rock Hill, South Carolina (TR 7-8).<sup>1</sup>

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<sup>1</sup>The following abbreviations will be used:

CX - Complainant's exhibits;  
 RX - Respondent's exhibits; and  
 TR - Transcript of hearing.

The ThermalKEM facility is regulated by state and federal authorities, the South Carolina Department of Environmental Control and the United States Environmental Protection Agency. Both agencies issue permits that strictly regulate the operation of the facility. The South Carolina Department of Health and Environmental Control or DHEC acts in the capacity of surrogate or delegate of the U.S. EPA in enforcing both federal and state hazardous waste laws and regulations (TR 8).

The Complainant, Johnny E. Miller, was employed by Analytakem from April 1990 until October 1991, when he went to work for a subsidiary company, ThermalKEM, Inc. His last job was as a dedicated line technician which required him to send liquid feed to the incinerator. Mr. Miller was discharged by ThermalKEM, Inc. on January 6, 1994.

Thus, the record reflects that Respondent is an employer and that the Complainant is an employee subject to the SWDA. In addition, the Complainant was discharged with respect to his term of employment.

### **ISSUES**

The issues presented in this matter are:

1. Whether Complainant engaged in conduct which is protected by the SWDA; and
2. Whether Respondent discharged Complainant in retaliation for complaints made under the SWDA.

### **CONTENTIONS**

The Complainant states that he was terminated on January 6, 1994, only days after he reported to management of the ThermalKEM hazardous waste incinerator that he had made up missed feeds and prepared the paperwork to follow the feed plan instead of preparing it to reflect how the liquid hazardous waste was actually fed. Mr. Miller advised company management that making up missed feeds and "making the paperwork fit" were practices that ThermalKEM had condoned and endorsed.

It is argued that the Complainant engaged in protected activity when he informed ThermalKEM management about the practices of overfeeding hazardous wastes and falsifying paperwork. Moreover, numerous witnesses at the trial substantiated that making up feeds and/or falsifying paperwork were the norm at ThermalKEM (see TR 660-990).

In addition, a former site supervisor, Graylon Branson, exercised his Fifth Amendment privilege in response to a series of questions regarding his involvement in giving instructions or taking

actions to make up missed feeds and to falsify paperwork. The Complainant contends that an adverse inference should be drawn from Mr. Branson's refusal to testify.

The Complainant also argues that he is protected under the SWDA as he was discharged at a time when he was "about to" testify as to violations of the Act by the company. Furthermore, it is alleged that the Respondent's conduct regarding the bypass issue is evidence of pretext, and consequently a retaliatory motive as the firm admitted that the bypass was not a factor in his termination (TR 2502).

At this point, this Administrative Law Judge would note that this question involves whether or not Mr. Miller used an independent air line to avoid the dedicated line interlock safety switch on the day of the thermal relief stack (TRS) opening on December 28, 1993.

Additionally, the Complainant argues that the short proximity in time between Mr. Miller's protected activity and the decision to fire him is evidence of a retaliatory motive. Moreover, the Respondent did not undertake a good faith investigation of the Complainant's allegations of routine making up of missed feeds and of falsifying paperwork.

Furthermore, the Complainant alleges that the Respondent's hostile attitude toward employee testimony in this case provides evidence of retaliatory motive, that the firm did not follow normal policy in the termination, and that Mr. Miller was subject to disparate treatment.

The Respondent renews its motion for summary decision and argues that:

Mr. Miller is not a "whistleblower" within the meaning of the Act. Reportedly, the case law is clear that in order to invoke the protections of a whistleblower statute, an individual must engage in some affirmative act motivated by concern for the public. Mr. Miller has taken no affirmative action, and, to the extent that he acted passively, his actions were clearly not motivated out of concern for public welfare or the environment.

Prior to Mr. Miller's termination, he had not contacted or been contacted by the South Carolina Department of Health and Environmental Control, the United States Environmental Protection Agency or any other governmental agency to provide information regarding ThermalKEM's operations. He also admittedly had not raised any environmental, health or safety concerns, either in person or anonymously, with ThermalKEM's supervisors, management or compliance personnel during the course of his entire employment at ThermalKEM. Indeed, Mr. Miller testified that "as far as telling anyone that I would turn them in for any practices, I would never have done that." He further testified that he had no plans to testify against

ThermalKEM in any proceedings and that it would be "sheer speculation" as to whether or not he would ever have done so.

It is also clear that ThermalKEM management and supervisors did not perceive Mr. Miller to be a whistleblower. All of the individuals involved in the December 27-28, 1993, incident which precipitated Mr. Miller's discharge and those involved in the meetings immediately preceding his termination--Bernard Howze, Donald Koon (Mr. Miller's direct supervisor), William Andre and William Scull--testified that they formed an opinion either at the time of the incident on December 27-28, 1993, or at least prior to the first disciplinary meeting with Mr. Miller on January 3, 1994, that Mr. Miller should and would be terminated based on his poor work performance and the severity of his most recent breach of Company policy. It was at this January 3rd meeting that Mr. Miller allegedly "blew the whistle" for the first time. Thus, even if he had engaged in any protected activity, a proposition wholly unsupported by the extensive record in this case, his protected activity did not occur until after supervisory personnel and management had determined he should be terminated. Mr. Miller simply has not established any conceivable causal link between his alleged protected activity and his termination from ThermalKEM.

The Respondent argues that contrary to the self-serving picture Mr. Miller tries to paint of himself, he is the antithesis of the concerned individual who blows the whistle out of sincere regard for human health and the environment, whom the statute was designed to protect. Indeed, his actions fall squarely within the exception to the SWDA whistleblower provisions, which denies protection to any individual who, acting without direction from his employer, deliberately violates any requirement of the SWDA. Mr. Miller admittedly falsified documents on "hundreds" of occasions in an effort to hide his actions from regulators and ThermalKEM management, a practice he alleges was engaged in by others. Yet he never brought this alleged practice to the attention of supervisors or management until it became apparent that he would lose his job. He was motivated purely by a desire to "save his own hide" -- not by concern for the public welfare.

Moreover, the Respondent contends that the Company had legitimate, nondiscriminatory reasons for terminating Mr. Miller's employment for his conduct on December 27-28, 1993. Mr. Miller did not deny that he had overfed the incinerator and falsified documents to cover up that conduct. Importantly, that conduct

followed closely on the heels of an incident only two weeks earlier in which Mr. Miller was caught sleeping on the job. On this occasion, Mr. Miller's direct supervisor informed him that any further violation of Company policy, whatever the nature of the infraction, would result in Mr. Miller's immediate termination. Mr. Miller had been back on the job for less than three (3) days at the time of the December 27-28 incident. The gravity of Mr. Miller's conduct on December 27-28, 1993, was severe and provided sufficient basis for his discharge, particularly in light of his past work performance.

### Protected Activity

The hazardous waste incinerator burns materials that are fed from the solid waste chute, from the dedicated line, and from blend tank 502. In essence, the incinerator is intended to burn the waste at temperatures from 2250 to 2400 degrees. The safety interlock system was designed to shut down feeds to the incinerator when the temperature reached 2500 degrees.

If the system reaches a temperature of 2500 degrees, automatic safety devices will "presumably" be triggered to cease all feeds to the incinerator in order to prevent damage to the plant. However, if the safety devices do not function properly to lower the temperature, the thermal relief stack (TRS) will open and vent the unburned materials into the atmosphere. The state agency will take immediate action to investigate the reasons for the TRS opening. (It is noted that the state agency constantly monitors the facility.)

It is ThermalKEM, Inc.'s policy to design feed plans for all three systems for all of the shifts. As various materials are burned at different times, consideration is given to the BTU content and to the weights of the materials to be burned. The feed plan instructs the person feeding the waste as to the types of material and amounts to be burned each hour.

Personnel who fed the liquids to the incinerator were designated as blend tank technicians or dedicated line technicians depending on the system being used. These technicians completed reports (production logs) which "presumably" indicated the materials burned, and "allegedly" followed the feed plan.

In the hour between 4 a.m. and 5 a.m. on the morning of December 28, 1993, temperatures increased in the incinerator and indicators in the control room suggested that the dedicated line safety switch had engaged. The switch was designed to cut off power to the pump for the dedicated line. In theory, if feeds were cut off to the incinerator, the temperature would drop and return to recommended limits.

Control room records indicate that the dedicated line safety switch engaged at 4:10 a.m. but temperatures continued to increase in the incinerator. The TRS opened at 4:27 and closed at 4:28.

Mr. Miller testified that after the TRS opening, it was discovered that the dedicated line pump was still running and sending liquids into the incinerator. This pump was shut down at 4:40 a.m. on December 28.

During the 12-hour shift from 7 p.m. on December 27 through 7 a.m. on December 28, 1993, Mr. Miller worked directly with Andrena "Drina" Calhoun who was being trained as a blend tank technician. During that shift, Lourdes "Vanella" Figueroa was the process planner and Donald Koon was the supervisor.

The Complainant testified that there were meetings on December 30, 1993, and on January 3, 1994. On December 30, 1993, Miller met with Koon and Bill Andre, the personnel director. Miller testified that he informed the others that the dedicated line switch failed on December 28 and that the control room technician did not check to see if the pump was turned off. Miller denied using an outside air line to bypass the safety switch.

On December 30, Miller reportedly told these two that he fell behind on the feed plan on December 27 as he was teaching Drina how to clean tank 502. Reportedly, when Koon learned of the lag in implementing the feed plan, Koon told Miller to make up the missed feeds.

In addition, Miller advised these supervisors that Koon must have known about the making up of missed feeds as Koon was aware of mechanical breakdowns and the production logs. Miller also stated that there had been numerous occasions when feeds had been made at his convenience or when feeds were made in excess of the hourly plan in order to make up for feeds that were missed earlier in the shift due to mechanical problems.

Miller advised the personnel at the December 30 meeting that this was a normal way of working in the company. He had been trained by Pop Robinson and others to perform in that way. These others had implied that such methods were condoned by management because "if you don't burn, you don't earn."

On January 3, 1994, Miller met with Andre, Scull and Koon. Mr. Andre testified that Miller reported that numerous personnel had made up missed feeds. William Scull, the process control manager, agreed to investigate these allegations. Scull testified that on January 6, 1994, he informed Miller that other personnel had not confirmed Miller's allegations regarding misfeeds. On January 6, in the presence of Andre and George Ohlrich, Andre's boss, Scull informed Miller that he had been terminated.

Miller has contended that he was dismissed because he made "internal" whistleblower complaints on December 30, 1993, and on January 3, 1994.

The Respondent alleges that Miller's comments at these two meetings do not meet the definition of internal whistleblowing. Moreover, the firm was ready to dismiss Miller in late December as he was informed after the December 15 reprimand that any further instance of

misconduct would lead to dismissal. It is also argued that ThermalKEM, Inc. was not aware that Miller's comments at the two meetings were equivalent to whistleblowing. In addition, the Respondent cites 42 USC §6971(d) which states that the employee protection provisions of the Solid Waste Disposal Act shall not apply to an employee who deliberately violates the Act.

Once again, this Administrative Law Judge has considered the Respondent's motion for summary decision on the basis that Miller does not meet the definition of whistleblower under the Act. However I must conclude that the Secretary of Labor has provided a liberal definition of internal whistleblowing.

In Helmstetter v. Pacific Gas, Case No. 91 TSC 1, Decision and Remand Order, January 13, 1993, the Secretary stated:

Reporting violations of environmental statutes internally to one's employer is protected activity under whistleblower provisions. (See Goldstein v. Ebasco Constructors, Inc., Case No. 86-ERA-36, final dec. and ord. , April 7, 1992; McCuiston v. TVA, Case No. 89-ERA-6, final dec. and ord. November 13, 1991; Francis v. Bogan, Inc., 86-ERA-8, final dec. and ord. April 1, 1988; Smith v. Norco Technical Services, Case No. 85-ERA-17, final dec. and ord. October 2, 1987; and Willy v. Coastal Corp., Case No. 85-CAA-1, dec. and ord. on remand June 4, 1987.

In these rulings, the Secretary has cited Couty v. Dole, 886 F.2d 147 (8th Cir. 1989), Kansas Gas & Electric v. Brock, 780 F.2d 1505 (10th Cir. 1985), Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984), and Consolidated Edison Co. of New York v. Donovan, 673 F.2d 61 (2d Cir. 1982).

In view of these holdings, I conclude that in the two meetings with management personnel, Mr. Miller made internal complaints which reported violations of an environmental statute. I also hold that the Respondent must have known that Miller engaged in protected activity in view of the serious nature of the reported allegations.

Each side has expressed arguments regarding whether Miller was "about to testify in any proceeding" associated with environmental matters. I must concur with the Respondent that it would be pure speculation to assume that Miller would be subpoenaed to testify in another matter related to ThermalKEM, Inc. Miller has clearly stated that he had no intention of contacting the Environmental Protection Agency or a state agency while he worked for ThermalKEM, Inc.

The Respondent has also argued that Miller should not be entitled to relief as he deliberately violated part (d) of 42 USC §6971. I have not found precedent on this issue, and I decline to rule in this matter.

Retaliation Motivated In Part By Employee's Engaging in Protected Activity

The Complainant alleges that his whistleblowing activities must have played a part in his dismissal as he was fired less than 10 days after his initial complaints. While it was reported that ThermalKEM had made an investigation after the revelations, the Complainant argues that such an inquiry was superficial at best as he was fired on January 6, 1994.

In view of Miller's protected activity and his discharge shortly thereafter, I must conclude that Miller has established a prima facie showing that the protected conduct was a "motivating factor" in the employer's decision to dismiss the Complainant. See Mt Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Goldstein v. Ebasco Constructors, Inc., Case No. 86-ERA-36, final dec. and ord. April 7, 1992; and Conaway v. Valvoline Instant Oil Change, Inc., Case No. 91-SWD-4 final dec. and order January 5, 1993.

Dual Motive As To Termination

If the Employee establishes a prima facie case, the Employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the Employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. Burdine, supra, 450 U.S. 248, 254-255; see Dartey v. Zack, Case No. 82-ERA-2, final dec. and ord. April 25, 1983.

The Respondent states that Miller was disciplined following an incident that occurred on December 15, 1993. At that point, he was informed that any other fraction of company rules would lead to his dismissal. Miller returned to work after a 3-day suspension and the TRS opening occurred on December 28. The Respondent states that prior to the first meeting, the supervisors had decided to terminate Miller's employment.

On December 15, 1993, supervisors Donald Koon and Bernard Howze "observed" Mr. Miller sleeping while at work (TR 620). However, this offense was written up as taking excessive breaks (TR 621). The corrective action form reflects that Miller was suspended without pay from December 19 through December 21, 1993. This report was signed by Mr. Miller and contained the notation that "another violation of this kind or any violation of safety policy could result in your discharge." (RX 2F). Other corrective action forms for the period from November 1992 through September 1993 are contained at RX 2a-2e.

At the hearing, William Andre, the personnel manager, discussed RX 7, the Respondent's rules of conduct (TR 2170-2175). Andre testified that it is to be used as a guide, but it basically outlines the different rules of conduct which could result in being disciplined and possibly even a discharge depending on the severity of the violation. . . .

(Actions that could lead to termination included theft.) One is striking another employee, harassment of an employee, whether it be sexual or whatever. Violation of regulatory -- of environment regulations, violation of safety regulations, insubordination, falsification of documents, possession of drugs and/or alcohol on the premises, firearms. Carry a firearm on the premises. Those are the things. That's basically what I discussed with these new employees when they come to work. Sleeping on the job. These are the things that could get you in trouble. (TR 2170-75)

Donald Koon completed an incident report which indicated that about 4:15 am on December 28, 1993, the temperature in the incinerator increased to over 2800 degrees and the TRS opened. Causes included weights being exceeded to make up for time not run, and poor job performance by Miller (CX 25).

Miller testified that he met with Koon, Andre, and Scull on December 30 and on January 3. However, testimony from the others indicates that those meetings were on January 3 and January 6, 1994.

The Complainant has also indicated that he was trained by Jerry "Pop" Robinson, Gerald Lynn, David Berry, and by Wardell Mills (TR 266). Miller indicated that these four people as well as Juan McMoore, Roger Haygood, Donald Koon, and Harvey Wilson knew of the practices of making up missed feeds and inaccurately recording on production logs (TR 270). At the first meeting, Miller informed Scull that Koon had told him to make up the drums on December 27-28 (TR 503).

Donald Koon testified that in October 1993 he became the process control supervisor on Miller's shift (TR 1306). Thereafter, Koon observed his employees, and he held a meeting with them on November 3, 1993. At that time, Koon discussed wearing the proper protection gear and staying at the work station. In addition, the workers were advised to follow the feed plan and to properly record the materials that were burned (TR 1312-1323) (See RX-4A and 4Q).

In early December 1993, Koon observed that Miller was frequently out of his work area. Koon instructed the Complainant that "the paperwork should reflect the work that he was doing, to make sure it was done properly." (TR 1325)

On December 13, 1993, Bernard Howze, who had previously held Koon's job, summoned Koon to observe Miller sleeping on the job. Howze advised Koon to terminate Miller for sleeping but Danny Williams, another supervisor, suggested leniency. Therefore, on December 15, Koon gave Miller a three-day suspension for "excessive breaks in an unauthorized area." The corrective action

form stated, in part "another violation of this kind or any violation of safety policy, could result in your discharge." (TR 1340) (See RX 2F and RX 4L)

Miller was suspended from December 19 through 21, 1993. He worked on December 22 and was on break until his shift returned on December 26. On the December 27 shift, Miller was scheduled to pump drums through the dedicated line and to train Andrena Calhoun in cleaning out tank 502. Koon was aware that Miller was not following the feed plan but Koon kept silent as the priority was to clean tank 502.

Koon testified that Miller finished the tank about midnight, took a break, and then submitted drum identification numbers to Dwayne McDaniel, a process planner, for a compatibility check. The list was approved, Koon checked the list when the computers came back on line at 1:30, and the list was given to Miller. Miller then obtained the listed drums and began pumping from the dedicate line about 2:30 am on December 28 (TR 1360).

Lourdes "Vanella" Figueroa testified that as a feed planner in December 1993, she received instructions from the process planner and then she made the feed plans for the dedicated line and for tank 502. As the incinerator could burn a certain weight per hour and be in compliance, she would check the computer as to the schedule for solid waste burns before she made her plans. The solid waste would have to be deleted from the total allowable and then the remaining allowable weight would be scheduled for a combination of the dedicated line and for the blend tank. Thereafter, the feed plan was given to the feed person, Johnny Miller, for implementation (TR 1608). (See CX 18; RX 4).

Koon testified that on the morning of December 28, he heard Mike Hutchinson from the control room call Howze and report an increased temperature in the boiler. When Koon arrived in the control room, he found that Howze had checked the controls and had sent someone to check whether the dedicated line pump was still operating.

After the TRS opening incident was over, Koon secured a copy of the feed plan from Vanella. He then asked Andrena Calhoun for the ID numbers of the drums that had been pumped on the dedicated line. Koon checked the contents of the drums on the computer, and he concluded that the materials pumped through the line had such a high BTU content as to cause overheating in the incinerator and the TRS opening (TR 1418).

Miller informed Koon that it appeared that the dedicated line air supply was hooked up wrong, but Miller denied performing such activity. THIS ADMINISTRATIVE LAW JUDGE WOULD NOTE THAT SUCH A HOOK UP HAS NOT BEEN PROVEN AND THAT THE RESPONDENT HAS WITHDRAWN THIS ACCUSATION.

Koon testified that:

Well, before Johnny went home that morning, I -- I -- I'm pretty sure that I told him that things weren't looking so good for him with the

TRS opening and the excessive weight through the dedicated line.  
(TR 1418)

Koon completed an incident report on December 28 after consulting with Howze (see CX 25). Koon stated that he completed part of the corrective action form (CX 27) on December 28, 1993, and that Scull added additional language on January 6, 1994.

About 8 am on December 28, Koon discussed the incident with Andre, the personnel director. Prior to the next shift, Koon learned that Miller was to be suspended pending an investigation, and Koon relayed the message to the Complainant. Koon spoke with Scull on the morning of January 3, and Koon recommended Miller's termination. Later that day, Miller met with Koon, Andre and Scull.

Koon testified that Miller discussed the events on December 28. Koon stated that Miller acknowledged that Koon had told him to follow the feed plans. Koon testified that he had never advised an employee to make up missed feeds or to prepare false paperwork (TR 1448).

Koon testified that during each shift, he made a production report which listed the drum count of feeds to the incinerator. Koon acknowledged that as the micromotion or volume meter on tank 502 was frequently clogged, a rubber hose was sometimes used to bypass the micromotion and keep sludge moving to the incinerator (TR 1506). At such a time, the feed from the tank was measured by the "stick method" where a marked stick was inserted to the bottom of the tank to calculate the remaining content.

Koon testified that he did not pay much attention to the thermal input logs as he relied on the process planner to handle such paperwork. The witness acknowledged that it was his responsibility to ensure that feed records were properly completed. He stated that he was not aware of an indication that the thermal input logs showed "far too precise a record of feed from the tank 502 to the incinerator." (TR 1518) Koon reported that he did not compare the maintenance reports regarding outage to the thermal input logs of production.

Andre, the personnel manager, testified that he reviewed Miller's personnel file after the three-day suspension in mid December and prior to the TRS opening. At that point, he concluded that Miller's next violation of rules would result in termination (TR 2177).

Andre reported that Miller met with Andre, Scull, and Koon on January 3, 1994. During the discussion, Miller stated that everyone "does make up feed plans." Scull told Miller that he would investigate the allegation. Robert Holley, a dedicated line technician, was called in and he informed Andre and Scull that he had never made up missed feeds or been asked to perform such activity (TR 2181).

Scull, who was the process control manager in late 1993, testified that on December 30, 1993, he learned of the TRS opening, and he spoke with Koon when he returned to work on January 3,

1994. Koon submitted documents which have been identified as CX 25, RX 12, CX 18, and a partially completed CX 27.

During the meeting with Koon, Scull asked him "how he felt about it, and he told me that he had talked to Johnny Miller just two weeks prior, specifically, about staying on the job, you know, following the feed plan and doing as he was suppose to do. He also informed me that he produced a write-up near that time with regard to his performance. It had to do with excessive breaks and that he felt that he should be terminated at that time -- or terminated at this time on January 3" (TR 2206).

At that point, Scull told Koon that if those facts were true, then Miller should be terminated. However, Scull wanted to talk to Miller before any action was taken. Later on January 3, Scull met with Miller, Koon, Andre, and George Ohlrich, the human resource manager.

At this time, Scull read the portion of the incident report (CX 27) that had been completed by Koon (TR 2215). Miller did not dispute the report, acknowledged that Koon told him to follow the feed plan, and stated that on December 28, he did what he always did and what everyone else had done. Miller was shown Vanella's feed plan (CX 18 and RX 12) but he stated that Vanella had given him a sheet of paper that called for feeds between 1 a.m. and 3 a.m. However, this sheet had been discarded.

Koon mentioned a hose in the dedicated line room that appeared to be bypassing the safety interlock. Miller reported that he saw such a hose when he came to work. Later, Holley informed Scull that it would be wrong to make up missed feeds and stated that he had not been trained to do such things. Scull and Andre spoke with Vanella Figueroa who stated that Miller received a paper with the same information as shown on CX 18 and RX 12.

During the next two days, Scull spoke with two liquid techs, Gary Cooper and Napoleon Clifton. Each person gave a response similar to that of Holley. Scull spoke to Linda Sutton, a central inventory supervisor, regarding Miller's paperwork and Scull agreed that the feed on December 28 should reflect a start at 2:30 a.m. rather than at 1 a.m. (see CX 21, p. 91).

On January 6, Scull completed his portion of the corrective action form (CX 27). He subsequently met with Miller, Andre, and Ohlrich. Scull discussed his investigation and Miller stated that these people lied and had worked as he did. Miller reported that Koon should have known about the practice as Koon was always in the area.

Scull and Andre testified, in essence, that Miller had made no mention of contracting DHEC or EPA, he made no indication of testifying in an environmental hearing, and he did not raise environmental or compliance issues.

Earl Staley testified that he was the quality coordinator for ThermalKEM, Inc. and that his job included quality assurance for the incinerator. He performed a daily review of the feed records.

Staley stated that he understood that Graylan Branson, the incinerator supervisor authorized misfeeding of solid wastes on March 3, 1994, and that Branson was discharged for that offense. In addition, in February 1994, a Dan Williams approved two misfeeds and he was terminated for that incident. Staley reported that about two years ago, Kevin Feester was fired after it was determined that he made solid feeds in excess of the feed plan.

After Williams was dismissed, Staley began a new computer program. This program compared the incinerator feed records to the maintenance records. Under the new system, discrepancies as to feed times and down times were identified and corrected. Prior to the new system, Staley did not compare feed reports to maintenance logs. In addition, Staley had previously only compared the thermal input log to the incinerator feed records to ensure that all drums were listed. Staley did not question the feed times as listed by the feed technicians.

Graylan Branson, who was the site manager for ThermalKEM, Inc. until March 1994, testified but, in general, invoked the Fifth Amendment privilege against self incrimination. Independent counsel was provided by the Respondent. Branson did state that he had never received instructions to make up missed feeds (TR 731).

Bernard Howze testified that in late 1993, he was the incinerator supervisor on C shift. In mid December 1993, Howze and several others found Miller sleeping, and Koon, the immediate supervisor of Miller, was summoned.

On December 28, 1993, the temperature in the incinerator increased and the interlock safety device kicked in, but temperatures continued to climb beyond 2500 degrees. The temperature reached 2845 degrees and the TRS opened and closed, but the temperature climbed to 2864 degrees. It was determined that the dedicated line continued to run, and the pump was shut down between 4:30 and 4:40 a.m.

Thereafter, Howze accused Miller of bypassing the pump as Miller was responsible for the dedicated line and should have been at his station. Miller denied that he bypassed the system. Howze stated that the incinerator was damaged and had to be shut down for 65 hours to make repairs. Howze stated that Miller had never mentioned making up missed feeds or falsifying paperwork until shortly before this hearing. The witness indicated that he was unaware of any making up of missed feeds on the solid waste line until he learned of Branson's actions in March 1994 (TR 1264).

Howze denied instructing others to make up missed feeds, awareness of McCoy making up feeds on Howze's shift, or knowledge of an instance where a supervisor engaged in advocating such a practice. Howze indicated that he had attended high school with Miller and that in 1993 he was aware that Miller had a part-time job with Frito-Lay and that Miller was attending college on a part-time basis. The witness stated that it would have been possible to make up feeds from the dedicated line as this area could not be seen from the control room. Howze testified that Miller had never mentioned environmental concerns or violations of company procedures.

## DISCUSSION REGARDING RESPONDENT'S REASONS FOR DISMISSING THE COMPLAINANT

As previously expressed in this opinion, the undersigned has concluded that Miller made internal complaints while working for ThermalKEM, Inc., and thus, he engaged in protected activity under the SWDA.

On December 13, 1993, Koon and Howze found Miller sleeping at work, and this has been acknowledged by the Complainant. Pursuant to company rules, Miller could have been discharged for that offense. However, leniency was granted and Miller was suspended for three days without pay. It was made clear at the time that any further violation "may" result in termination.

Miller has admitted that he did not follow the feed plan for December 27-28, 1993, and he has stated the amount of the materials pumped in the morning were in excess of those required in Vanella's feed plan (CX 18; RX 12). The Complainant has stated that the feed plan that he received for that night differs from this exhibit. However, Miller's copy of the plan has not been submitted into the record, as it was presumably discarded.

After Koon learned of the overfeeding, he recommended Miller's termination to Andre and to Scull prior to the latter two meeting with Miller. At meetings with management in early January, the Complainant admitted that he had overfed the system and falsified paperwork on the night in question and on other occasions.

At face value, the termination was justified based on the December 28 violations of the company rules, especially in light of the personnel action on December 15 (the 3-day suspension for "excessive breaks.").

The Complainant has testified that on January 3, he informed Andre, Scull, and Koon that Koon had told him to make up missed feeds on December 28. The others disagree with this statement, and they indicate that on the third Koon reminded Miller that he had been told to follow the feed plans.

It is apparent that Scull did not question all of the personnel that Miller reported had made up missed feeds and falsified paperwork. However, in the next three days Scull spoke with three liquid technicians, Holley, Cooper, and Clifton. These people, as well as Koon and Linda Sutton, denied knowledge of such activity in the plant.

I recognize that a short period of time passed between Miller's suspension on the evening of December 28 and his discharge on January 6. However, management was aware that the Complainant had violated the company rules by ignoring feed plans and overfeeding the incinerator. In addition, people who held the same job as Miller were interviewed and denied such violations. Moreover, Koon denied such awareness of these violations, and Scull and Andre expressed a lack of knowledge of such activities.

Where evidence of "dual motive" exists, i.e., where reasons other than retaliation may also account for the employee's termination with his employer, the employer has the burden to prove by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected conduct. Passaic Valley Sewerage Commissioners v. U.S. Department of Labor, 992 F.2d 474, 481. (3rd Cir. 1993). See Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977); Mackowiak, 735 F.2d at 1163-64; Consolidated Edison, 673 F.2d at 62-63.

Once a prima facie case of unlawful discrimination against the employee is established, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the plaintiff was dismissed for a legitimate, nondiscriminatory reason. To accomplish this, the Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the Complainant's rejection. The explanation provided must be legally sufficient to justify a judgment for the Respondent. If the Respondent carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 255 (1981).

In a retaliatory discharge case such as the present one, "the aggrieved employee may prevail only if he would not have been discharged but for his participation in the statutorily protected activity." Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986).

Thus, as of January 6, 1994, there had been a violation of the rules on December 13, 1993, with a subsequent three-day suspension, and another admitted violation of company regulations on December 28, 1993. Moreover, Koon denied knowledge of violations, and ThermalKEM, Inc., through Scull, questioned other employees in a status similar to Miller's.

Therefore, I find no retaliation in the discharge action on January 6 as the record at that time indicates that Miller had clearly violated the rules and that management had no part in or knowledge of making up missed feeds or of falsifying paperwork.

#### REASON FOR DISMISSAL AS A PRETEXT FOR DISCRIMINATION

If the employee establishes a prima facie case, the Employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. Burdine, supra, 450 U.S. 248, 254-255.

If the employer successfully rebuts the employee's prima facie case, the employee still has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . . . [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

employer's proffered explanation is unworthy of credence." Id. at 256 (citation omitted.) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Dartey v. Zack Company, 82 ERA 2, slip op. Secretary of Labor (April 25, 1983), citing Burdine, supra.

The Complainant argues that he was subject to disparate treatment as others such as Howze had slept on the job and had not been reprimanded. In addition, workers routinely made up missed feeds and falsified paperwork. Management either encouraged such activity or should have known that such actions occurred. Moreover, during the investigation management did not interview the personnel identified by Miller. The Complainant also alleges a hostile attitude toward employee testimony in this case.

At the hearing, Scull testified that the following individuals had never held a supervisory position with ThermalKEM, Inc.: David Berry, Calvin Burnette, Andrena Calhoun, Samuel Dunham, Lourdes Figueroa, Robert Holley, Shawn Lowery, Gerald Lynn, Vincent McCoy, Dwayne McDaniel, Juan McMoore, Johnny Miller, Lawrence Moore, Gene Wray, and Jerry "Pop" Robinson. (TR 2199, 2200)

Andrena "Drina" Calhoun testified that she began working for the Employer in 1992 and that she became dedicated line liquid technician in November 1993. Miller was her trainer in late 1993, and at the beginning of each shift Vanella gave them a piece of paper which indicated how much weight had to be burned on the shift.

At that point, Miller would add up the weight needed for the night and deduct the weight from drums pumped the previous night which was more than the prior feed plan. Then Miller would find drums to match the remaining weight and submit the stickers from the drums to Dwayne McDaniel or Donald Koon for approval.

When the drums were approved, Miller and Calhoun would burn the waste at their leisure rather than according to the feed plan. The drums were usually pumped one after another. Miller completed the paperwork and tried to match the feed plan.

Calhoun testified that she started pumping drums from the dedicated line somewhere between 1:00 and 2:30 a.m. on December 28, 1993. Miller brought eight drums to the line and she pumped all of these. The witness testified that Vanella always told her to follow the feed plan and that she did not see Koon on the night in question. Calhoun indicated that she had been retrained and that she now followed the feed plans. She reported that she was not disciplined for the incident in December.

Lourdes "Vanella" Figueroa testified that she did not become aware of misfeeds or falsification of records until after the December TRS opening. She denied awareness of Koon telling Miller to make up feeds. On December 27, she asked Miller when he was going to run the dedicated line and he indicated that it would be done. On one occasion, Vanella saw that Miller still had drum stickers after his shift was over. (TR 1606-1639)

Juan McMoore reported that he was reluctant to testify and stated that he had held several jobs, including dedicated line technician, while working for the company. He was trained by Jerry "Pop" Robinson and he learned by example to make up missed feeds and prepare false paperwork.

McMoore acknowledged that he had engaged in such conduct, and he felt that Koon, Harvey Wilson, and Roger Haygood knew about these activities. At one point, McMoore heard Haygood tell Engel that Miller was fired for doing what everyone else was doing. The witness stated that if stickers were left over after a shift, these would be placed on the log on the next occasion that that shift worked. McMoore expressed the opinion that Kevin Feester, a solid waste technician, was fired for incompetency (TR 643-723).

Roger Haygood testified that he was the SPU supervisor. He denied that he had discussed Miller's termination with Engel or with McMoore. Haygood acknowledged that he was aware that a missed feed had been made up on the solid waste line (TR 961-966).

Lee Engel, the maintenance manager, testified that he checked out the dedicated line about 8:30 a.m. on December 28. In the absence of David Berry, Juan McMoore was sent to assist Engel. Robert Webber, an electrical technician, checked the system and found that the safety interlock worked in the absence of an extra airline on the pump. Engel testified that Haygood did not make a comment about Miller's performance. (TR 2116-2169)

Gerald Lynn testified that when he worked on the dedicated line, David Berry, a process coordinator, told him to make up drums after the line returned to service. Berry had been supervised by Roger Haygood and by Danny Williams.

David Berry testified that he was a coordinator of feeds when Miller was a dedicated line person. Berry stated that he had never been told to make up missed feeds and he reported that he did not tell Miller to perform such activity.

Vincent McCoy testified that he was a solid waste operator for ThermalKEM, Inc. from July 1990 to April 1992. Howze and Williams were his supervisors, and Howze would meet with Lee Thompson, the feed technician who would tell McCoy how to fill out the paperwork. Howze told him "no burn, no earn." (TR 798) McCoy indicated that he was fired after he was injured when not wearing the proper clothing.

Gene Wray testified that in late 1993, he worked on the dedicated line. The process planner was Harvey Wilson, and Danny Williams was the supervisor. Wray was trained by Miller and Holley, and he would retain stickers for drums that were pumped in excess of the feed plan for a shift. The stickers would be used on subsequent shifts to indicate weight burned. Mark Chelimer, a supervisor, had directed him to make up missed feeds. Wray stated that he was dismissed for "absenteeism."

Robert Dwayne McDaniel testified that in late 1993, he was working as a process planner with Miller and Koon. McDaniel suspected that Miller was making up missed feeds as he was frequently

away from his work station. On one occasion, McDaniel saw Miller with extra drum stickers , but McDaniel indicated that it was not his job to monitor the production records.

McDaniel testified that Mark Chelimer was a supervisor who desired that the incinerator work at maximum capacity. If one line was not functioning Chelimer would increase the feeds through the other lines. McDaniel reported that neither he nor Chelimer had ever told anyone to make up missed feeds or falsify paperwork.

Samuel Dunham testified that he worked as a feed tech and that he felt awkward at the proceeding as it could affect his employment. Dunham stated that on one occasion in 1994, a supervisor named "Steve or Dave" Anderson told him to fix the paperwork regarding drums that were left over from a shift. Presumably , Graylan Branson gave permission to push solid waste on that occasion.

Calvin Burnette testified that he was a dedicated line technician from September 1989 to April 1992. Burnette indicated that he made up missed feeds and adjusted his paperwork as directed by David Berry and "Lee or Bill" Thompson who were either process planners or coordinators.

Robert Holley testified that he had been a dedicated line technician for 2-1/2 years. In January 1994, he informed Scull that he had never made up feeds or falsified documents. Holley acknowledged that he was given discipline of 3 days off without pay when he was found sleeping several years ago when he worked in another part of the plant. On one occasion Mark Chelimer, a former manager, had told Holley to pump drums of the feed plan.

Linda Sutton testified that in late 1993, she worked as a process control supervisor. She reported that she recognized pages 89 and 91 of CX 21, which pertains to shift production logs for C shift beginning at 7 p.m. on December 27, 1993. Staley expressed concerns about the times on page 91 and asked Sutton to investigate. Sutton created page 89 based on information from Mr. Staley. The witness stated that she did not have knowledge of misfeeds and reported that she had never instructed anyone to falsify documents.

Others testifying at the hearing included Sean Lowery, Jacqueline Miller (the Complainant's wife), Hydrick Smith, Lawrence Moore, Kristal Davis, and Tim Glass.

Johnny Miller was recalled on the last day of the hearing. The Complainant stated that on occasion he would work on the solid feed lines. If this line was inoperable for less than an hour, Howze would tell him to make up the missed feeds.

Attention was called to the November safety meeting which was led by Koon. The following discourse occurred between Mr. Guild and the Complainant.

Q. How did you understand Mr. Koon's instructions about the paperwork, that is the feed paperwork that he gave you in that meeting?

- A. He just told me to make sure that the paperwork was correct, and what I understood that to mean is to make sure that the paperwork matched what she (Vanella Figueroa) wanted for that hour according to the feed plan. (TR 2305) . . .
- Q. If you submitted paper at the end of the shift that failed to properly match the specified feed times in the informal feed plan, what if any action was taken?
- A. They had to give it back to you and you had to correct it. That's what they'd do if it was, you know, wrong. Well, it was also stated that, you know, transcription errors did occur, and they would just give it back to you and you'd correct it. (TR 2316, 2317)

Miller testified that Drena Calhoun pumped the drums on the morning of December 28. However, he accepted responsibility for this action as he was her trainer at the time.

#### Discussion Regarding the Respondent's Reason for Dismissal As A Pretext for Discrimination

Several non-supervisors including Calhoun, Juan McMoore, Lynn, McCoy, Wray, and Burnette testified that they had either made up missed feeds or falsified paperwork. Testimony indicated that Mark Chelimer had asked Holley to make misfeeds, but Chelimer left ThermalKEM, Inc., prior to the 1993 TRS opening.

David Berry has been mentioned as requesting a make up of feeds, but Berry is a non-supervisor and he denied such activity at the hearing. References have been made regarding Howze and Koon requesting misfeeds or records falsification. However, at the first meeting in January, Koon, Andre, and Scull reported that Koon reminded Miller that Miller had been told to follow the feed plans and they stated that the Complainant acknowledged that Koon had given such a directive.

Both Koon and Howze have denied the accusations of misconduct and I do not find significant evidence in the record to substantiate such charges. It is noted that the alleged misconduct of Branson, Williams, and Anderson occurred in 1994, after Miller's dismissal.

The record reflects that Holley was found sleeping on the job and was given discipline similar to that which Miller received. Howze acknowledged the fact that he may have fallen asleep for a very short period of time during his employment. However, the evidence does not establish that Howze was actually seen sleeping by others.

I conclude that ThermalKEM, Inc. supervisors did not authorize or condone the making up of missed feeds or the falsification of records.

In addition, I do not find proof of disparate treatment in this case. The record establishes that two employees, Miller and Holley, were found to be sleeping on the job and each was given a three-day suspension, although each could have been fired.

Moreover, at the time that Miller was discharged for admitted overfeeding of the incinerator, the record does not reflect that supervisors and management had knowledge of such activities by others. The record indicates that Feester was fired for incompetence and that McCoy was dismissed for violating safety procedures.

It is apparent that during the time period in question, numerous employees did not follow the feed plans, fed the incinerator at will, made up missed feeds, and falsified paperwork. The Respondent has alleged ignorance of these activities prior to the December 1993 TRS opening. While ThermalKEM, Inc. may be correct in this assertion, the undersigned is dismayed by knowledge that Staley, the quality coordinator, never compared the feed production logs to the maintenance reports of outages before 1994. In addition, supervisor Koon testified that while it was his responsibility to ensure that feed records were properly completed, he left such duties to others.

### **CONCLUSION**

In light of the above facts, the Complainant has established that he was engaged in protected activity and has established a prima facie case of retaliatory discharge.

However, the Respondent has set forth legitimate, nondiscriminatory reasons to justify the Complainant's discharge. Consequently, I find that the complaint is without merit.

### **RECOMMENDED ORDER**

It is respectfully recommended to the Secretary of Labor that the complaint be DISMISSED.

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RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/dlh  
Newport News, Virginia

**NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals,**

**U.S. Department of Labor , Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).**